

STATE OF MICHIGAN
COURT OF APPEALS

EDDIE DANIELS and FAYE DANIELS,
Deceased,

UNPUBLISHED
September 14, 2001

Plaintiffs-Appellants,

v

PAUL PETERSON and DONALD RIEL,

No. 173275
Ingham Circuit Court
LC No. 93-74801-NO

Defendants-Appellees.

ON REMAND
ON REHEARING

Before: Saad, P.J., and Zahra and Collins, JJ.

SAAD, P.J. (*dissenting*)

I respectfully dissent. Plaintiffs' complaint does not set forth a description of the events immediately preceding Daniels' collision. Therefore, based on the pleadings alone, the record is insufficient to determine whether defendants' conduct, or some other conduct or event may have constituted the most efficient, direct cause of Daniels' injuries. While I recognize that it is very likely that defendants' alleged failure to submit a report and order was simply too remote in time and place to constitute "*the proximate cause*" of Daniels' injuries, it would appear that there should be a fuller record regarding what other events may have preceded the crash. Accordingly, I would remand for development of facts on this issue that the trial court prematurely granted defendants' motion for summary disposition under MCR 2.116(C)(8).

However, my conclusion that the pleadings alone provide an insufficient basis for a grant of summary disposition does not preclude the dismissal of plaintiffs' complaint pursuant to MCR 2.116(C)(7) or MCR 2.116(C)(10), both of which require the court to consider, in addition to the pleadings, affidavits and other documentary evidence. *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999). I am aware of this Court's prerogative to review a motion for summary disposition under the correct rule if the trial court improperly grants the motion under the wrong rule. *Spiek v Dep't of Trans*, 456 Mich 331, 338 n9 (1998). However, the documentary evidence attached to the parties' motion and response briefs does not reveal sufficient facts regarding the events leading to the collision to determine *the proximate cause* of plaintiff's injuries. Therefore, I would find it necessary to remand this case for further proceedings to establish a sufficient record to support the grant or denial of defendants' motion.

Accordingly, I would vacate the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and remand for further proceedings of defendants' motion pursuant to MCR 2.116 (C)(7) and MCR 2.116(C)(10).¹

/s/ Henry William Saad

¹ I note that the trial court denied defendants' motion as premature under MCR 2.116(C)(10) because discovery was incomplete. The trial court may allow defendants to renew their motion at the close of discovery, when discovery of the disputed issue is complete, or when there is sufficient evidence showing "there is no reasonable chance that further discovery will result in factual support for the nonmoving party." *Colista v Thomas*, 241 Mich App 529, 537-538; 616 NW2d 249 (2000). Moreover, although defendants did not cite MCR 2.116(C)(7) as a basis for dismissal, their brief specifically contends that plaintiff's claim is barred because of immunity granted by law.